

# The Public Hearing and Law-Making Procedures

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**Abstract** This article examines the institution of the public hearing in contemporary constitutional systems. After considering the public hearing in light of the concept of deliberative democracy, the authors present various normative and practical measures implemented in selected countries. It is claimed that public deliberation affects the quality of legislation and makes it more legitimate. The public hearing as a stage in the legislative procedure requires a mature reciprocal dialogue between individuals and the state authorities as well as a readiness to reach appropriate decisions. The authors argue that to make the public hearing more effective, the law-maker or its organs should have a duty to inform the opinion about the extent to which the public proposals have been taken into account.

**Keywords** Public hearing · Legislative procedures · Deliberative democracy · Public consultations

## Introduction

The purpose of this paper is to discuss and elucidate current trends in the function of the institution of the public hearing as a part of law-making process in contemporary constitutional systems. We understand the public hearing to be a discussion regarding a particular topic that is open to interested parties, including private individuals, that is based on the direct participation of these parties. In other words, the public hearing requires a personal presence and allows for an interactive debate between the participants. This debate is strictly connected with the implementation of public policies and public-good projects within a political organism, i.e. a state or

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international organisation, and constitutes a way in which a final decision is shaped. Thus, the notion ‘public’ refers, first, to the fact that numerous subjects may be involved; however, it also usually means disclosure of this procedure to anyone who is interested.

The public hearing will be presented in juxtaposition to the theory of participatory democracy. In the paper, we argue that, on the one hand, the possibility of presenting various approaches is beneficial for the law-making system as it promotes social activity, and, on the other, the real efficiency of the public hearing might be limited as political decision makers are reluctant to take into account critical remarks because they may disrupt their plans.] A duty to inform the public about the extent to which public proposals have been taken into account and which have been rejected could, to some extent, mitigate this negative phenomenon.

The public hearing may take on diverse forms. The most important differentiation seems to consist of the division between public hearings that are strictly connected with law-making procedures and those that aim at gaining a more general insight to various proposals submitted in the public space with a view to the regulation of a specific public matter in the future. The public hearing has already been the subject of extensive scholarly interest, especially in the context of US solutions.<sup>1</sup> The importance of public hearings increased significantly when decisions regarding their openness were made in the House of Representatives in 1973 and in the Senate in 1975. Since that time, public hearings in the US have been held behind closed doors only in extraordinary circumstances.<sup>2</sup> Currently, there is a need to pursue additional research on the institution of the public hearing because it is becoming more popular as a part of expanded public consultation in many countries and within the institution of the European Union.

In this paper, we focus on public hearings connected with the preparation of a draft of a normative act (whether it be a bill or a draft of secondary legislation), even though it is sometimes difficult to distinguish this type of public hearing from a public hearing connected to the fulfilment of the scrutiny function of parliament (especially in Anglo-Saxon countries). The arguments will be presented using examples of solutions accepted in selected countries with various governance systems, including the parliamentary-cabinet system (United Kingdom), the presidential system (United States), the chancellor system (Germany) and the so-called ‘rationalised’ parliamentary-cabinet system (Poland). In these countries one may observe the most characteristic features for a respective system of government. Additionally, Poland constitutes an example of a model east/central European country which undertook the successful democratic transformation.

The legislative public hearing may be conducted during the passage of statutes and sometimes during acts of an executive nature (likewise in Poland and Germany, for instance). In this context, it must be noted that holding a public hearing prior to the issuance of normative acts by the executive authority causes justifiable doubt because these may be *strict* executive acts, which strongly limit the possibility of

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<sup>1</sup> See for instance: Cole and Caputo (1984), Checkoway (1981), Diermeier and Feddersen (2000) and the American literature quoted there.

<sup>2</sup> Małajny (1993) at 188–189.

interference in their substantive content. In Poland, for instance, these kind of acts, called regulations, are issued by the executive authorities that are specified within the Constitution on the basis of specific authorization contained within a statute and for the purpose of its implementation. In these circumstances, a public hearing appears to be a means of exercising control regarding the conformity of regulations with the issuance of authorization stated in a statute, or it may be a method of improving the execution of a statute in accordance with the scope and content of its authorization.<sup>3</sup> The scope of a public hearing may involve not only drafts of legislative acts concerning ordinary matters but also drafts of other types of acts—for example, budget acts, acts which are classified as urgent and, significantly, acts which introduce amendments to a constitution. A public hearing can be treated as a type of public consultation, but these two institutions can be distinguished from each other. Public/social consultations vary and may take place at different stages in the decision-making process. Public consultations involve the gathering of opinions, views and convictions on a given topic by an authorised organ. They are usually expressed in writing and do not require oral interaction between the participants. These consultations may occur during work on the structure of a planned legislative initiative. They are performed within different social environments, usually engaging those who may be potentially interested in the subject matter of a bill and often through a weakly formalised procedure, using various forms of communication (e.g. ordinary mail, e-mail and Internet polls).

Usually, this type of consultation constitutes a part of the presentation of a governmental legislative program and, as such, it concerns bills that are later submitted to parliament. Occasionally, there is a legal obligation to seek consultation with respect to a specific bill that addresses certain subjects with which a future statute will be concerned.<sup>4</sup>

Both public hearings and public consultations may also be indirectly connected to the formalized process of a law-making decision. Thus, they may involve the gathering of various viewpoints of institutions, NGOs and ordinary people with a view of the construction of a particular policy or of engaging in a specific activity. In addition, they may serve in the evaluation of previous undertakings or decisions by the formulation of questions for public assessment and by soliciting public comment.<sup>5</sup>

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<sup>3</sup> Wolpiuk (2006) at 57.

<sup>4</sup> For instance, in Switzerland, the subjects of consultation include constitutional amendments, federal bills and international agreements that are subject to referenda or that concern the essential interests of cantons. See Art. 3 Vernehmlassungsgesetz, SR 172.061.

<sup>5</sup> As an example, one might point to various initiatives undertaken by the European Commission through the project 'Your Voice in Europe'. Consultations under the auspices of the European Commission are treated as an important issue in the process of European governance. Their role and significance were emphasized in the document issued by the European Commission on 11 December 2002: Commission, 'Towards a Reinforced Culture of Consultation and Dialogue—General Principles and Minimum Standards for Consultation of Interested Parties by the Commission' (COM 2002 704) <[http://ec.europa.eu/governance/docs/comm\\_standards\\_en.pdf](http://ec.europa.eu/governance/docs/comm_standards_en.pdf)> (last accessed 25 July 2015).

## Theoretical Insights

The institutions of public hearings must be perceived as the realization of postulates formulated by various doctrines of deliberative democracy.<sup>6</sup> Within the theory of law, there is a trend towards speaking about social types of law-making.<sup>7</sup> This type falls under Nonet and Selznick's responsive law stage in which the law should, first of all, be sensitive to social changes.<sup>8</sup> This stage is the most developed model of law within the evolutionary doctrine favoured by the above-mentioned authors, following from the two earlier stages of repressing and autonomic stages. In the social form of law-making, the most important method is the communicative method, whereby the communicative factor within the law-making process harmonizes with the evolutionary theory of law,<sup>9</sup> W. Załuski emphasizes that:

“the Darwinian model of the origins of law is the most accurate one and that law serves the realization of ‘the cooperative potential’ inherent on human nature. In his conviction, the law is a manifestation of our cooperative dispositions and not a product of reason nor of cultural evolution, but flows from human nature.”<sup>10</sup>

The discursive method of law making is the best known thanks to the communicative theory created by J. Habermas.<sup>11</sup> His communicative model of action is oriented towards mutual understanding. According to Habermas, the discourse has to be *rational*—i.e., communicative rationality has to be rooted in the inter-subjective structures of communication. Thus, only those activities free from force and repression can be taken into account and only the ‘forceless force of the better argument’ matters.<sup>12</sup> The product of a rational discourse is a rational consensus. As L. Thomassen emphasizes, with Habermas, rational consensus and rational discourse both function as a regulative idea<sup>13</sup>: Habermas combines his communicative theory with the concept of deliberative politics.<sup>14</sup> The process of law-making should be enriched with the results of deliberation. It is, however, unclear—as Flynn observes—to what extent communicative power is centred inside parliament (or rather around it):

“A narrow reading of the role of communicative power would locate its generation primarily in the institutions authorized to make binding decisions. While the wide reading takes its cue from the binding force of reasons and

<sup>6</sup> See e.g. Dryzek (2000), Bohman and Rehg (1997).

<sup>7</sup> Kustra (1994) at 33 ff; Sarkowicz and Stelmach (1998) at 121.

<sup>8</sup> Nonet and Selznick (1978) *passim*.

<sup>9</sup> According to Załuski ‘law is an emergent entity which supervenes on social practices of cooperation’. Załuski argues that the lower-level entity on which law supervenes comprises our evolved cooperative dispositions. See Załuski (2009) at 77.

<sup>10</sup> Załuski (2009), *ibid*.

<sup>11</sup> Habermas (1984).

<sup>12</sup> Habermas (1975) at 108.

<sup>13</sup> Thomassen (2010) at 70.

<sup>14</sup> Habermas (1996).

shared beliefs to emphasize the *communicative* aspect of communicative power, the narrow reading relies more on the institutionalized binding force of decisions, which is located only in the formal political system.”<sup>15</sup>

Independently of various possible interpretations of Habermas’s thought, it is clear that his theory has contributed to the dissemination of the idea of participatory democracy. This does not mean, of course, that the consensual model of law-making should be the only one which can be accepted in the modern democratic state. As R. Sarkowicz and J. Stelmach emphasize, with the social type of law-making, elements of instrumental, argumentative and consensual rationality interweave and complement one another.<sup>16</sup>

One can also perceive public commitments in law-making as a consequence of deliberative democracy as understood by D. Rousseau, as something beyond a representative democracy.<sup>17</sup> Rousseau creates his theory, first of all, as the justification of constitutional justice; however, his ‘continuous democracy’ requires the participation of various subjects in developing the shape of legal norms. In this sense, the self-acting of legislative organs seems to be insufficient. Indeed, it is in this direction that M. V. Hoecke seems to head in considering the legitimacy of judicial review from the angle of deliberative democracy:

“Determining the meaning of the law is, therefore, a collective endeavour, which cannot be left to one body, be it a (supreme or constitutional) court or a parliament. It would be naive to think that the content of the law could ever be fully determined by a law-maker or even that this would be desirable. Deliberative democracy thus is not only important at the level of [the] justification and legitimation of the law, but also at the level of determining the content of the law.”<sup>18</sup>

Public participation in law-making decisions promotes an idea of civil society. Those individuals who want to have a real impact on the content of normative acts are encouraged to cooperate. This may result in the activation of various interest groups, including organizations and associations. In this context, the role of interest groups is sometimes perceived as being even more important for the concept of a participatory democracy than that of individual citizens.<sup>19</sup> It is argued that interest groups improve the efficiency of policy-making and ensure citizen participation. This is why interest groups are called ‘a bottom-up citizen-initiated phenomena’, as they play an important role in ‘explaining, raising and discussing the issues of the day’.<sup>20</sup> Another vital role of interest groups is providing law-makers with important information that might be difficult to obtain by a different route.<sup>21</sup> However, there

<sup>15</sup> Flynn (2004) at 446.

<sup>16</sup> Sarkowicz and Stelmach (1998) at 124.

<sup>17</sup> Rousseau (1995).

<sup>18</sup> Hoecke (2001) at 442.

<sup>19</sup> Saurugger (2009) at 174.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

are also the dangers of the elite capture or interest groups capture phenomena. These are situations in which elites or interest groups manipulate the decision making agenda to obtain most of the benefits.<sup>22</sup> Thus, political elites or certain civil society organizations may influence an institution of participatory democracy for their political gains.<sup>23</sup> Some scholars argue that this tendency might be overcome by the effective mobilization of citizens, yet it does not necessarily need to lead to the increased adoption of measures preferred by these citizens.<sup>24</sup>

Deliberative democracy may be interpreted in variety of ways, taking into account the content of decisions or acts discussed during various forms of public consultation. In this context, the ideological foundation of an elaborated decision may be identified and evaluated. From the liberal perspective, the protection of individual rights and freedoms should have primary place, while from the communitarian perspective stress is placed on communal values instead. Independently from the models proposed in the scholarship we are of the opinion that by the existence of an institutionalized platform of deliberation (such as public consultation and hearings) one may perceived as a important value as such. Thus, the conception presented by R. Forst seems to be the most attractive one, placing emphasis on the procedural criteria of democracy. Forst argues:

“What is the ‘ultimate ground’ of deliberative democracy? As opposed to liberal and communitarian answers which imply an instrumental understanding of democracy as either one possible or the only means to realize liberal principles or communal values, the ground of deliberative democracy is the basic moral right to justification which—when applied to a political context—calls for an institutionalization of forms of reciprocal and general justification.”<sup>25</sup>

The need of public participation in law making, including the institution of the public hearing, seems to be connected with a certain crisis of representative parliamentary democracy. This problem is evoked by the discussion of how the process of decision-making in the modern state should look and how to reconcile the idea of sovereignty of the people with the concept of representation. The complexity of modern legal regulations which encompasses an increasing indication of social life in many cases enables deputies to make proper and justified decisions. Thus, the political representation existing in a parliament must be in some way supplemented by the non-parliamentary representation articulated by various pressure groups expressing social, professional and even cultural interests.<sup>26</sup> This type of functional representation constitutes the most important correction of the representative mechanism in the modern democracy.<sup>27</sup> The public hearing constitutes one of many

<sup>22</sup> Wong (2012) at 332.

<sup>23</sup> Public Participations and Citizens Engagement (2015) at 6.

<sup>24</sup> Sheely 2015 at 251–266.

<sup>25</sup> Forst (2012) at 186.

<sup>26</sup> Szymanek (2013) at 378.

<sup>27</sup> Ibid.

possible measures, which strengthens participation in decision making process despite its imperfections signaled in this paper.

## Legal Grounds

In most modern democratic states public hearings are not explicitly mentioned in the written constitutions; however, one may argue that its concept is founded on the universal grounds of the constitutional principles of a state system (i.e. the principle of cooperation and social dialogue, the principle of democracy etc.) which are guidelines in the process of establishing its relevance in the scholarship of law. In fact, only the Spanish constitution provides that the law shall make provisions on the hearing of citizens, directly, or through organizations and associations recognized by law in the process of drawing up the administrative provisions which affect them.<sup>28</sup> The legal basis for public hearings is usually established by the standing orders of parliaments, which are passed in the form of resolutions and sometimes in the forms of acts. In the US, the structure of the public hearing as a part of the law-making process results both from the rules of procedure in the Houses<sup>29</sup> and from constitutional practice. One can state the same about the measures that exist at the level of the state legislatures.<sup>30</sup> Generally speaking, in Anglo-Saxon countries formal rules concerning public hearings are frequently vague, that is why many of them are organized as ad hoc events. As already noted above, in this legal culture, it is also hard to distinguish hearings that are strictly connected with the process of law making from various types of public inquiries that are conducted *inter alia* by parliamentary committees within their control function. In the UK, the Standing Orders of the House of Commons—Public Business (2013) allow both committees on legislation and select committees to hold one or two sessions for the purpose of taking evidence from interest groups and technical experts.<sup>31</sup> The competences of committees on legislation can be derived mainly from the wording of certain SOs, which allow them ‘to send for persons, papers, and records’.<sup>32</sup> It seems that a select committees of the House of Commons get this power by the resolution setting them up,<sup>33</sup> likewise in case of committees of the House of Lords.<sup>34</sup>

<sup>28</sup> Constitution of Spain, Art. 105. This constitutional provision has not been extensively developed in statutes. Act no. 30/1992 of November 26, 1992 on General Government and the Common Administrative Procedure (as last amended by Royal Decree No. 8/2011 of July 1, 2011) does not deal with this matter in an extensive way, but Art. 86 of such Act states something that is relevant for our purposes. It says that a competent administrative body can establish a citizen’s hearing stage during the administrative rule-making procedure.

<sup>29</sup> See Rules of the House of Representative (113th Congress): Rule X for instance, sec 4 (a) (1) (A) and (C) or Rule XI sec (2) (A); Rules of the US Senate, rule XXVI.

<sup>30</sup> See for instance, Rule 4 s 6 (6), sec 10 and 11 of the Texas House Rules (83rd Legislature 2013).

<sup>31</sup> See SO 84A (2), (3) as well as SO 131 (questions), 133 (reporting evidence to the House), and especially SO 135.

<sup>32</sup> See SOs 63 (2) (b), 84A (2) and 84A (3).

<sup>33</sup> This conclusion can be drawn from the wording of SO 135.

<sup>34</sup> See SO 67.

In Germany, the only legal basis for public hearings is the Rules of Procedure of the German *Bundestag* of 28 January 1952 (section 70).<sup>35</sup> Previously, public hearings were regulated by the Rules of procedure of the *Bundesrat* of 8 September 1950—(section 18).<sup>36</sup> In fact, the *Bundesrat* rarely exercised the opportunity to hold public hearings, which led to the elimination of this institution from the Rules.<sup>37</sup>

In turn, in Poland, public hearings are held pursuant to the Act of 7 July 2005 on lobbying activity in the process of law making and the Standing Orders of the *Sejm* and the Senate.<sup>38</sup> As an execution of delegation stated in the Act of 2005, specific provisions were introduced in the Regulations of the Council of Ministers of 7 February 2006 on public hearings regarding regulation drafts<sup>39</sup> and in the Regulations of the Council of Ministers of 22 August 2011 on the notification of interests in works on bills and draft legislation guidelines.<sup>40</sup>

## The Forum of the Public Hearing

At the level of parliamentary law making, parliamentary committees or subcommittees constitute the most popular venue of a public hearing. In the US, at the federal level, they are organised by standing committees of Congress. At the state level, public hearings are held by state legislatures or other authorities in which legislative power is vested.<sup>41</sup> In the UK, hearings of experts and witnesses may be conducted by committees responsible for legislation<sup>42</sup> and by the select committees of the House of Commons; however, strict legislative hearings do not occur often.<sup>43</sup>

<sup>35</sup> (BGBl. II S. 389) as published on 2 July 1980 (BGBl. I S. 1237) and as amended by the Notification of 23 April 2014 (BGBl. I S. 534).

<sup>36</sup> BGBl. I S. 768 as published on 26 November 1993 (BGBl. I S. 2007) and as amended on 8 June 2007 (BGBl. I S. 1057).

<sup>37</sup> The reason why public hearings were given so little importance in the *Bundesrat* lies in both its composition and its manner of proceeding. The *Bundesrat* is composed of technocrats who participate in committee sessions that are conducted in a bureaucratic manner. There is also a question of the short time period that is given to the *Bundesrat* for the consideration of bills. See Działocha (1987) at p. 96.

<sup>38</sup> See the resolution of the *Sejm* of the Republic of Poland of 30 July 1992, the Standing Orders of the *Sejm* of the Republic of Poland (in particular, under its chap 1a, which was added by means of a resolution of the *Sejm* on 24 February 2006 on amending the Standing Orders of the *Sejm* of the Republic of Poland); The resolution of the Senate of the Republic of Poland of 23 November 1990 and the Standing Orders of the Senate of the Republic of Poland (Art. 80a was added by means of a resolution of the Senate on 20 June 2013).

<sup>39</sup> Journal of Laws of the Republic of Poland, No 30, item 207.

<sup>40</sup> Dz.U. Nr 181, poz. 1080—Journal of Laws of the Republic of Poland, No 181, item 1080.

<sup>41</sup> Wróblewska (2014) at 236.

<sup>42</sup> See SO 84 ('general committees'), SO 84(b)—'public bill committees' (are used for nearly all new bills).

<sup>43</sup> In this context, it is worth quoting L. G. Billings who emphasizes that '[t]here is a significant difference between the public processes in the United States political system and in parliamentary systems. For example, in the British parliamentary system, the focus on policy and accompanying decisions are made when the political parties develop platforms or 'manifestos'. In the British parliamentary system, the election determines which party's manifesto is most widely supported. The majority government that comes to power in the election implements its manifesto with little or no further



With regards to the House of Lords, when a bill goes to a special public bill committee (which is rare; often a bill is taken to a committee by the whole House), it may take evidence for a limited period before examining the text of the bill. A hearing may also take place in the House of Lords' select committees or relevant subcommittees<sup>44</sup> but, as in the Commons, it is usually connected with relevant inquiries.<sup>45</sup> In Germany, public hearings (*öffentliche Anhörung*)—which, until 1969, were known as public informative sessions (*öffentliche Informationssitzungen*)—are held in sessions of the committees of the *Bundestag* at the national level and, at the state level, they are held in the parliaments of some of the states. In Poland, public hearings are held in sessions of committees of the *Sejm* and the Senate with regard to bills; with regard to drafts of regulations, public hearings are organized by subject for the respective draft.

## Participants and Procedural Aspects

In the UK, taking into account that SO's of the Houses envisage that committees can send for anyone one can argue that a public hearing may be organised with the presence of various subjects such as associations, organizations, persons representing various institutions, as well as representatives of a government agenda. Committees decide what witnesses they wish to appear before them for public questioning. In Germany, experts (*Sachverständige*) and representatives of interest groups (*Interessenvertreter*) and other persons who are able to furnish information (*andere Auskunftspersonen*) may be heard.<sup>46</sup> In Poland both the statute and the parliamentary rules of procedure introduce the right to apply for participation in a public hearing when it is announced.<sup>47</sup> The parties entitled to lodge an application are: professional lobbyists (entrepreneurs or natural persons who act for profit on the basis of contracts in favour of third parties), lobbyists who are not officially registered (i.e., persons who provide notice of participation, but are not professional lobbyists) and any parties interested (for instance social organizations, professional self-governing bodies, associations, foundations, and citizens).<sup>48</sup> The Polish law

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Footnote 43 continued

public input. Yet, exactly the opposite is true in a political system based on the republican form as exists in the United States. Parties do have their platforms, but they are usually ignored after the election. The separation between the legislative and the executive branches requires a negotiated policy result, especially when one party controls the legislative branch and the other party controls the executive branch. In this case, hearings are a means of informing the media, political supporters, the public and interest groups of the implications of and options for public policy.' See 'Billings (2000) at p. 12.

<sup>44</sup> They are either appointed for one task or for continuing inquiries, eg on the Constitution, EU, Economic Affairs, Science and Technology.

<sup>45</sup> See SO 67.

<sup>46</sup> Rules of Procedure of the German *Bundestag*, sec 70(1).

<sup>47</sup> Act of 7 July 2005 on lobbying activity in the process of law making, Art. 8(2) and 9(3).

See also the Standing Orders of the *Sejm* of the Republic of Poland, Art 70b (1) and (2) and the Standing Orders of the Senate of the Republic of Poland, Art. 80a (2).

<sup>48</sup> The procedure of notification of participation in a public hearing is stated in Art 70b of the Standing Orders of the *Sejm* of the Republic of Poland.

also permits the establishment of a limit on the number of participants for technical reasons and for reasons of space availability.<sup>49</sup> According to Article 70d (1) of the Standing Orders of the *Sejm* and Article 80a (3) of the Standing Orders of the Senate, this reduction should be based on a reasonable criterion applied equally to each entity (for instance, the sequence in which declarations were submitted). This restriction for the number of participants has been criticized by the scholarship because it allows a broad range of discretion in this respect.<sup>50</sup>

The public hearing is generally optional; thus, a party who is invited to participate in a public hearing has a right (but not an obligation) to participate. However, different measures have been adopted in these countries where, apart from strict legislative hearings, investigative hearings also occur. This prospect creates the need to institute relevant rules applicable to the summoning of parties who are supposed to be witnesses and rules governing the proceeding, accountability for the failure to attend the hearing, and accountability for false statements.<sup>51</sup> In the UK, there is no precise legal rule in which a select committee or the House of Commons could punish a person who was called to be a witness. According to R. Gordon and A. Street, refusal by someone to appear or to answer questions could be reported by the committee to the House, and then the House could treat this as contempt of the House.<sup>52</sup> However, while the Parliament has disciplinary powers over its own members (including expulsion), the authors argue that there are no effective coercive powers against those outside the House. In theory, the similar problem could arise in the case of legislative hearings, i.e. when a committee concerned with legislation (public bills) is at the exceptional stage of being able to receive witnesses, but it seems to be unlikely.

The authority that is entitled to hold a public hearing makes the decision to start the procedure. In Poland, for example, in the case of a public hearing on a bill in the *Sejm*, a resolution must be passed by the committee to which the bill has been referred for consideration. In some cases, a prior request of a committee member or group of members is required for the resolution to be passed. In Poland, a written request by a deputy who is a committee member is possible,<sup>53</sup> while in Germany, this motion must be put forward by, at least, one-fourth of the committee members.<sup>54</sup> If the committee that considers a bill does not introduce a public hearing or limits it to the issues connected to the committee's scope of interest, another committee that participates in work on that bill may, in consultation, decide on holding a public hearing.<sup>55</sup> In Poland, the decision regarding whether to hold a

<sup>49</sup> Standing Orders of the *Sejm* of the Republic of Poland, Art. 70d(1) and Standing Orders of the Senate of the Republic of Poland, Art. 80a (3).

<sup>50</sup> See n 41 op. cit. at 102–103.

<sup>51</sup> Wójtowicz (1987) at p. 38.

<sup>52</sup> Gordon and Street, *Select Committees and Coercive Powers—Clarity or Confusion?* (The Constitution Society, 2012) <<http://www.consoc.org.uk/wp-content/uploads/2012/06/Select-Committees-and-Coercive-Powers-Clarity-or-Confusion.pdf>> (last assed 15 July 2015).

<sup>53</sup> Standing Orders of the *Sejm* of the Republic of Poland, Art. 70a (3).

<sup>54</sup> Rules of Procedure of the German *Bundestag*, rule 70(4).

<sup>55</sup> Szmyt (1993) at p. 122.

public hearing on a draft regulation is made by the authority that is responsible for drawing up the draft.<sup>56</sup> This means that a public hearing is held based on the good faith of the authority entitled to do so; therefore, it cannot be demanded by the parties who are entitled to participate. As it is seen, in Poland parties are entitled to apply to be heard as soon as a public hearing is announced, however whether a public hearing is held lies in the discretion of the competent authority.

The public hearing is usually held at a precisely determined stage in the process of law making. The hearing should not be too early or too late. Holding a public hearing prematurely (e.g. after the introduction of legislation, but before it is formally verified) may lead to the failure to apply information that is essential in the matter and that was gathered in the public hearing (e.g., because of the rejection of the legislation that was introduced). Similarly, a public hearing that is held too late may make it impossible to apply the information gathered for a bill (e.g. because of the termination of the period in which amendments may be introduced). It is sometimes proposed that a public hearing should be held at the stage in which a bill is drawn up, before the party who is entitled to introduce the legislation in parliament has exercised this right.<sup>57</sup> In the US, legislative hearings are scheduled after a bill is referred to committees responsible for its content. The hearings are preceded by the process of consultations and meetings between the staff of a committee and interested groups.<sup>58</sup> It must also be noted that in the US, another form of legislative hearings occurs, i.e. an oversight hearing, which may take place after a statute has entered into force.<sup>59</sup> This type of hearing is associated with assessing the implementation of a particular statute, however legislative committees may decide on this occasion whether a new law is needed in a given field.

A document providing for a public hearing usually contains specified information, i.e., it indicates the matter, the date and the place of the public hearing that will be held. In Poland, a resolution to hold a public hearing must specify, in particular, the date and the time of the public hearing. The resolution and the information regarding the location of a public hearing must be made accessible on the Information System of the *Sejm* at least 14 days prior to the day of the public hearing.<sup>60</sup> It is worth adding that in the case of bills or budget acts classified as urgent, this term is shortened to at least three days prior to the date of the public hearing,<sup>61</sup> which implies the necessity of passing laws faster or on time. In the US, a document providing notice of a public hearing specifies the date, the place and the matter of the public hearing.<sup>62</sup> It must be published in the Daily Digest and made publicly available in electronic form.<sup>63</sup> Additionally, in Germany, a committee

<sup>56</sup> Eg Regulations of the Council of Ministers of 7 February 2006 on public hearings regarding regulation drafts, s 3(1).

<sup>57</sup> Makowski and Zbieranek (2007).

<sup>58</sup> See n 43 op. cit. at 17.

<sup>59</sup> Ibid, at 16.

<sup>60</sup> Ibid, Art. 70a (5).

<sup>61</sup> Ibid, Art. 70a (6).

<sup>62</sup> House Rule XI, clause 2 (g)(2)(A).

<sup>63</sup> Ibid, clause 2 (g)(2)(C)).

provides information regarding the location and the date of the public hearing.<sup>64</sup> The public hearing should, on the one hand, ensure the opportunity to express an opinion regarding the subject matter of a bill by all parties who are allowed to participate in the hearing; on the other hand, it should not be used to delay the procedures of law making. For these reasons, in certain countries, the time and duration of a public hearing is specified. In the Republic of Poland, for example, a public hearing must be held at only one sitting of the committee<sup>65</sup>; however, because of the need for a quick and efficient proceeding, the order for the day of the sitting of the committee during which a public hearing is to be held must not include other items.<sup>66</sup> Additionally, in the case of regulation drafts, a public hearing may be performed jointly with an inter-ministry adjustment conference regarding the draft. In the US public hearings are usually held at one committee session that lasts one day, part of a day or even several days<sup>67</sup> (however, similar meetings may be held in numerous cities, depending on whether the matter they concern is of a federal or local scope).<sup>68</sup> In Poland, it is possible to change the date and the place of the public hearing or even cancel the scheduled hearing due to space availability and technical circumstances (this concerns the *Sejm*'s hearings only). The reasons for the cancellation must be published. This general and imprecise wording makes it relatively easy to cancel a public hearing and broadens the range of discretion that may be exercised.

To proceed in a quick and efficient way during a public hearing, a person responsible for holding it must be appointed. In Poland, the chairman of the committee is responsible for holding a public hearing with regard to bills; a representative of the authority that prepared a draft is responsible with regard to regulations. The chairman of the committee must establish an order and time limits for speeches by the entities that will participate in the public hearing.<sup>69</sup> These entities may speak only once during the sitting at which the public hearing is held.<sup>70</sup> In particularly justified circumstances, the chairman of the committee may adjourn the sitting at which the public hearing is held.<sup>71</sup> The chairman must determine the date, time and place of the resumption of the sitting.<sup>72</sup> In the US, the chairman of the committee is responsible for the course of the public hearing.<sup>73</sup> The chairman may punish breaches of order and decorum and of professional ethics on the part of counsel by censure and exclusion of persons from the hearings, and the committee may cite the offender to the House for contempt.<sup>74</sup> In Germany, the key players in

<sup>64</sup> Rules of Procedure of the German *Bundestag*, Rule 70(3).

<sup>65</sup> Standing Orders of the *Sejm*, Art. 70f (2).

<sup>66</sup> *Ibid*, Art. 70f (3).

<sup>67</sup> See n. 43, at p. 17.

<sup>68</sup> In Canada, a public hearing may take weeks or even months, see Creighton (2005) at 130.

<sup>69</sup> Standing Orders of the *Sejm*, Art. 70g (1).

<sup>70</sup> *Ibid*, Art. 70g(2).

<sup>71</sup> *Ibid*, Art. 70h(1).

<sup>72</sup> *Ibid*, Art. 70h(2).

<sup>73</sup> House Rule XI, clause 2 (k)(1).

<sup>74</sup> House Rule XI, clause 2 (k)(4).

the committee that works on a bill are the committee chairman, experts in parliamentary fractions, committee rapporteurs established for a given bill, a committee assistant and ministry officers. For each bill, therefore, a group of people that formed ad hoc is engaged.

The basic principle underlying a public hearing is its openness, which involves free admittance to the session at which the hearing is held, the presence of the press, and the provision of minutes. Thus, the exclusion of openness is an exception and not a rule. In the US for example, public hearings are open to the public; however, they will be closed if the disclosure of the testimony, evidence, or other matters to be considered would endanger national security, compromise sensitive law enforcement information, or violate a law or rule of the House.<sup>75</sup>

The German institution of the public hearing has had a wider application since the 1960s. Presently it is used quite often in parliamentary work. In parliament's fifth term, 28 issues were considered using a public hearing, while 58 sessions were held (V-28/58), and in the next terms correspondingly: VI-48/80, VII-48/76, VIII-53/70, IX-41/50, X-141/165, XI-185/235, XII-252/301, XIII-236/253.<sup>76</sup> In Poland, it has been the practice to hold public hearings since 2005. In the fifth (2005–2007) and sixth (2007–2011) terms of parliament, seven and twelve issues, respectively, underwent this process. Data is not available for the United Kingdom or the United States. In general one may notice that there are committees in which no public hearings are held or are held only occasionally, while public hearing concerning the same matter could be conducted several times by various committees.

## The Current Efficiency of the Public Hearing and its Future Developments

The question arises as to what extent the public commitment to law making influences the final content of a piece of legislation. One might wonder whether these institutions are not simply an embellishment of legislative or pre-legislative procedures.

Public hearings, as in the US, may be held to gain wider support for a bill (they are addressed to all of the parties involved, regardless of their knowledge or experience; as a result of the public hearings, the members of a committee are able to ponder public opinions regarding a bill; these public hearings provide a means for the exchange of thoughts and views before the passage of a bill)<sup>77</sup> or to obstruct it (lingering work on a bill either leads to the gaining of support for the bill in the committee or within society or it makes it impossible to close the proceedings regarding the bill until the second session of Congress is closed as a result of the failure to make progress on the bill).<sup>78</sup> In the context of hearings in the American

<sup>75</sup> House Rule XI, clause 2 (k)(4).

<sup>76</sup> Bückler (1989), at p. 110–111.

<sup>77</sup> Little and Ogle (2006) at 96.

<sup>78</sup> These consultations often lack precision and are characterized by questions that are unconnected to the topic being discussed and parties who ask questions based upon a shallow knowledge of the matters involved, leaving an impression of improvisation. See Małajny (1991) at 131.

Congress, L.G. Billings emphasizes that hearings are generally perceived as means by which members enforce or reinforce their particular proposals or view with respect to a bill or bills. Seldom do hearings change the outcome of a member's thought process on a bill. Thus, they are, to a degree, *pro forma*, because they are closely observed by various interests groups, and they become an important part of the political process.<sup>79</sup> In Germany, in accordance with rule 70(1), sentence 1 of the Rules of Procedure of the *Bundestag*, the public hearing is held for the purpose of obtaining information on a subject under debate (*zur Information über einen Gegenstand seiner Beratung*); therefore, a public hearing in this country has first of all an informative character.<sup>80</sup> In addition to its informative character, this institution provides an open confrontation of conflicting interests and aims to achieve compromise. Its public character—that is, the openness of such hearings—distinguishes it from the presentation of views by groups of interests before the executive power, which takes place at an earlier stage of the legislative work.<sup>81</sup> As the German practice shows, holding public hearings is rendered obvious when important bills regarding economic reforms, social issues, the sphere of research, smaller occupational groups or branches of manufacturing are considered.<sup>82</sup> These bills are discussed in the public session of a committee.<sup>83</sup> However, the character of such a hearing resembles the presentation of a particular issue rather than the explanation of it as a result of asked questions and given answers. The participants of such sessions argue that, in this way, the institution of hearings becomes less important, as both lawyers and interest groups participate in a commission's work on equal rights, while, in fact, the question of the validity of a bill is treated differently by an independent researcher and by a representative of an interest group who is directly interested in the given shape of a bill.<sup>84</sup>

These words may also refer to many other political systems where public hearings occur. Effective deliberation can but may not necessarily affect the quality of decisions by making them more legitimate.<sup>85</sup> Obviously, public hearings do not automatically contribute to better law; however, if treated seriously, they may justify the accepted measures (according to R. Forst's theory) and also make the regulations more adjusted to a concrete situation—at least they reveal selected legal problems. Without any doubt, the success of deliberative democracy depends upon the political culture of the society and on the actors in the political scene. The public hearing, a tool of this type of democracy, requires a reciprocal dialogue between its participants and their readiness to reach a reasonable compromise. Unfortunately, a significant obstacle to the real impact of the public hearing is, as has been already been determined in the scholarly literature, the frequent failure of government

<sup>79</sup> See n. 43 op. cit. at 18.

<sup>80</sup> However, experience provides many examples in which public hearings have exceeded their informative function in the German legal system (see n. 29 op. cit. at 95.).

<sup>81</sup> See n. 55 op. cit. at 122.

<sup>82</sup> Loewenberg (1969) at 390.

<sup>83</sup> See n. 37 op. cit. at 107.

<sup>84</sup> See n. 55 at 124–125.

<sup>85</sup> Gambetta (1998) at 23–24.

officials to perceive members of the general public as equals. As a consequence, it is difficult for citizens to share authority or decision-making power and to effectively assert their ideas.<sup>86</sup> The optional nature of public hearings (even when a high number of applicants have expressed their interest in the event) or hearings with the participation of only the invited entities may be perceived as a serious flaw.<sup>87</sup> In this context, the introduction of mandatory public hearings in some situations can constitute a possible measure. One cannot however forget that there are also possible dangers associated with the described method of participatory democracy, especially in the context of ‘elite capture’ mentioned above. Apart from the undesirable pressure of lobbyists on lawmakers who may only act in defence of their egoistic interests, never-ending discussions may cause inertia in legislative procedures, making them incapable of responding to the current challenges in society.

Generally, there are no rules specifying a method for the application of the materials gathered in public hearing procedures. In the Polish *Sejm*, the minutes constitute an official record of the proceedings of committee debates.<sup>88</sup> In the Standing Orders of the Polish Senate, there is a provision, which at least theoretically, provides a better guaranty that the results of a public hearing will be considered in additional parliamentary work. Article 80a, paragraph 7 stipulates that commissions must take positions on remarks submitted during a public hearing, present the conclusions drawn from them and, when necessary, show the reasons why they were not considered. This information must be placed on the Senate’s website. In the US, after the completion of a public hearing, a committee or subcommittee prepares an opinion expressing support for the information gained in a public hearing without introducing any changes, or it may propose a newly drafted document. In its opinion, a committee may also present a motion to stop the proceeding based on the information obtained in the public hearing.<sup>89</sup>

The failure to require documents in which organizers of the public hearing are obliged to take a stand regarding the remarks and proposals suggested by the participants may contribute to the marginalization of this institution. Parenthetically, this also complicates the detailed research of political practice because it is extremely difficult to ascertain the real influence of the participation of citizens on a draft of a normative act. Some public proposals may be reshaped by deputies or other decision makers in a way that one cannot determine if there is a connection between a public hearing that was conducted and the substance of the amendments that are reported during additional steps in the legislature procedure. Accordingly, the public hearing may have only an informative and educational character. *De lege ferenda*, to make the public hearing more efficient, the law should oblige

<sup>86</sup> Farkas (2013) at 417 and the literature quoted there.

<sup>87</sup> It is worth noting that as it results from the research carried out by H. H. Pedersen, D. Halpin, A. Rasmussen, experts constitute a significant part of the stakeholders when they are specifically invited to give evidence for parliamentary committees rather than when access is open (however open access is more characteristic for other forms of public participation than public hearings), whereas individuals tend to be excluded from the invited process. See Pedersen et al. (2015).

<sup>88</sup> Standing Orders of the *Sejm* of the Republic of Poland, Art. 166(1).

<sup>89</sup> See n 2 op. cit. at 189–190.



committees to publish the minutes or a record of the discussion and also the reasons for which some proposals were considered and why others were rejected. In this context, the provisions applied in the Polish Senate may be assessed positively. The legal obligation to publish such information expands civic control over legislative power. One must however remember that the concept of a free mandate excludes any limitations of MP's will. Consequently, voters in parliamentary elections may only evaluate the degree to which deputies take into account the civic arguments presented during a public hearing.

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